IN THE

Supreme Court of the United States

October Term, 1965.

No. ~~814~~ 37

CURTIS PUBLISHING COMPANY,
Petitioner,

v.

WALLACE BUTTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on July 16, 1965.

Opinions Below.

The opinions of the United States Court of Appeals for the Fifth Circuit (R. 1616-1678, 1786-1801, Appendix B, pp. 5a-75a) are not yet reported. The opinion of the United States District Court for the Northern District of Georgia on petitioner's motion for new trial (R. 88-101, Appendix B, pp. 76a-88a), is reported in 225 F. Supp. 916. The opinion of the United States District Court for the Northern District of Georgia, denying petitioner's motions for new trial under Fed. R. Civ. P. 60(b) (R. 1460-1468; Appendix B, pp. 89a-96a), is reported in 242 F. Supp. 390.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 16, 1965. A timely petition for rehearing was denied on October 1, 1965. The jurisdiction of the district court was based on diversity of citizenship and amount under 25 U. S. C. § 1352(a)(1). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented.

1. Whether the constitutional limitations on the standard of liability in libel actions, enunciated by the decision of this Court in *New York Times Co. v. Sullivan,* 376 U. S. 254 (1964), may be disregarded in reviewing a verdict and judgment rendered prior to the *New York Times* decision, on the ground that the constitutional question was not raised by the defendant at the antecedent trial.

2. Whether a publication charging, in substance, that the athletic director of a state university gave to the football coach of another state university confidential information calculated to affect the outcome of a forthcoming football game between the two schools is protected by the First Amendment, as interpreted by this Court in the *New York Times* and subsequent decisions.

3. Whether an award of $400,000 as punitive damages for libel, after a jury verdict of $3,000,000 in punitive damages, constituted, in the circumstances, an abridgement of freedom of the press or a taking of property without due process of law.

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved are set forth in Appendix A, pp. 1a-4a.

Statement.

This is a libel action instituted by respondent against the petitioner on March 25, 1963, in the United States District Court for the Northern District of Georgia demanding $5,000,000 in general damages and $5,000,000 punitive damages for the alleged defamation of respondent in an article published in *The Saturday Evening Post* of March 23, 1963.

The article (R. 1407-1410; Appendix D, pp. 101a-104a) entitled "The Story of a College Football Fix" and subtitled "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall," asserted that on September 14, 1962, eight days before the opening game of the football season between the University of Georgia and the University of Alabama, George Burnett, an insurance salesman in Atlanta, while dialing a local telephone number, was accidentally connected into a long distance telephone call from respondent at that local number to Paul Bryant in Tuscaloosa, Alabama. Respondent, the former head coach of the football team of the University of Georgia, was then athletic director of the University. Bryant was the head coach of the football team of Alabama.

According to the article:

> Burnett listened to the conversation between Butts and Bryant and heard Butts give Bryant detailed information about Georgia's team and the plays and formations it would use against Alabama in the forthcoming game.
>
> Occasionally, in response to Bryant's questions, Burnett heard Butts say "I don't know about that. I'll have to find out." The conversation ended with Bryant telling Butts that he would telephone him at home the next Sunday.

Burnett made notes of what he heard but decided to forget the incident and put his notes away.

Alabama won the football game 35-0, its team exhibiting familiarity with Georgia's plays and tactics.

After brooding about this until early January, Burnett decided to tell his story and exhibit his notes to Johnny Griffith, the head coach of Georgia's team. Griffith reported this information and gave Burnett's notes to the University authorities, precipitating an investigation in which Burnett cooperated and in the course of which Butts resigned as athletic director.

In an editorial accompanying the article, the *Post*'s editors referred to it as "the story of one fixed game of college football", asserting that the "corrupt were two men—Butts and Bryant—employed to educate and to guide young men."

Admitting the publication of the article, petitioner denied that it was published "wilfully, maliciously and falsely," as averred by the respondent (R. 22, 26) and also pleaded truth as a defense (R. 27)—a plea that the trial court ruled the defendant had the burden of establishing by a preponderance of evidence (R. 44, 1347).

At the trial it was established by records of the telephone company, and was not denied by respondent, that Butts telephoned Bryant on September 13,[1] the call lasting 15 minutes (R. 165-167, 1416). It was also proved and not denied that Bryant called Butts at his home the following Sunday, the call lasting one hour and seven minutes (R. 168-169, 1417). There was conflicting evidence, however, as to whether Butts gave Bryant any information about Georgia's team, formations and plays and as to the value of the information that Burnett, according to his prior

1. The article inaccurately fixed the date of the call as September 14, but Burnett's notes and testimony both fixed the date correctly as September 13 (R. 178, 189).

statement, his notes and his testimony, heard Butts give. There also was dispute as to the adequacy of the *Post*'s investigation of Burnett's story prior to its acceptance and publication and as to the publication policy followed by the *Post* under its recently changed command.

The District Court held that petitioner's evidence in support of its plea of truth sufficed to present a question for the jury, declining to direct a verdict for the plaintiff on that issue (R. 480-488). It charged the jury, in accordance with its prior ruling (R. 44) that the defendant had the burden of proving the truth of the "sting of the libel" by a preponderance of evidence (R. 1347, 1349); that unless the defendant proved the statements to be true, they were libelous per se (R. 1348-1350); that malice was "to be inferred" (R. 1353); and that "the law will presume that anyone so libeled must have suffered damage" (R. 1353). The jury also was instructed that where "it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required to award punitive damages" (R. 1356). Actual malice, the court charged, "encompasses the notion of ill will, spite, hatred and an intent to injure one" and "also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" (R. 1356).

On August 20, 1963, the jury returned a verdict in favor of respondent, awarding him $60,000 general damages and $3,000,000 punitive damages (R. 1371). Petitioner filed a timely motion for new trial, contending *inter alia* that the verdict for punitive damages was invalid under the First, Fifth and Fourteenth Amendments to the Constitution. On January 14, 1964, the District Court denied petitioner's constitutional claims on the ground that they represented only an attack on the Georgia statute allowing punitive damages and, as such, should have been

raised prior to verdict (225 F. Supp. at 920; Appendix B, p. 83a). However, the court found the amount of the punitive damages to be "grossly excessive" (225 F. Supp. at 920; Appendix B, p. 83a) and granted petitioner's motion for new trial conditioned on respondent failing to remit that portion of the punitive damages in excess of $400,000 within 20 days (225 F. Supp. at 922; Appendix B, p. 88a). Respondent filed the remittitur (R. 103). On January 22, 1964, the District Court entered judgment for $460,000 against petitioner (R. 105). Petitioner filed a notice of appeal to the Court of Appeals for the Fifth Circuit on January 24, 1964 (R. 106).

On February 28, 1964, petitioner moved again for a new trial under Rule 60(b)(2) of the Federal Rules of Civil Procedure on the ground of newly discovered evidence (R. 1428-1455). While this motion was pending, this Court, on March 9, 1964, decided *New York Times Co. v. Sullivan*, 376 U. S. 254. Thereafter, on March 23, 1964, petitioner filed an additional motion for new trial under Rule 60(b) contending that the respondent as Director of Athletics of the University of Georgia was a public official within the meaning of the *New York Times* decision and thus precluded from recovering for a statement relating to his official conduct without proof that the statement was published with knowledge that it was false or with reckless disregard of whether it was false or not; that the definition of "actual malice" given the jury by the District Court did not conform to this requirement; and that the evidence at the trial did not suffice to prove malice in this sense with the "convincing clarity" required by the *Times* decision.[2]

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2. The additional motion for new trial under Rule 60(b) was inadvertently omitted from the printed record. It is, however, included in the certified record filed in this Court with this petition and, for the convenience of the Court, is reproduced herein as Appendix C, pp. 97a-100a.

Though the issue had not been litigated as such at the trial, the record showed or it was subject to judicial notice that the University of Georgia is a state institution operated by the Board of Regents of the University System (*Ga. Code Ann.* §§ 32-101 et seq.); that the respondent was employed as the Director of Athletics of the University by the separately incorporated Athletic Association, an organization directed by faculty members and alumni which is an agent of and employed by the Board of Regents (R. 262, 1161-1165; see *Allen v. Regents,* 304 U. S. 439, 443, 452 [1938]); that by virtue of his position respondent was also a member of the faculty (R. 1466); that he received a salary of $12,000 per annum from the Association (R. 1162, 1165), part of his salary being paid directly by the University subject to teacher retirement (R. 810, 1123); and that his duties were to supervise the entire athletic program of the University, including the scheduling and location of intercollegiate games in all sports, planning and budgeting, the adding of new athletic facilities and ticket sales (R. 569, 654-655).

The District Court denied the motions for new trial on April 7, 1964, ruling both that the respondent was not a public official within the principle of the *New York Times* decision and that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not" (242 F. Supp. at 395; Appendix B, p. 96a). Petitioner filed a notice of appeal from this decision on April 10, 1964 (R. 1469).

On appeal from the judgment and the order denying the motion for new trial under Rule 60(b), petitioner urged the constitutional contentions rejected by the District Court on the motions for new trial and argued, in addition, that the judgment entered on the remittitur was repugnant to the Constitution.

The Court of Appeals affirmed the judgment by divided vote. The majority (Judge Spears, with the concurrence of Judge Brown) declined to rule upon petitioner's contentions based upon the *New York Times* decision on the ground that petitioner's failure to raise at the trial the constitutional questions that some of its attorneys knew were being litigated in the *Times* case "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in *Times*" (Appendix B, pp. 20a-21a). Ignoring the constitutional attack on the verdict, the Court also held that there was "ample basis for the trial court's judgment" in selecting "the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts" (Appendix B, p. 32a); and that the requirement of the remittitur of the punitive damages held to be excessive was "a permissible course" that "does not infringe upon the Seventh Amendment's guaranty of jury trial" (Appendix B, pp. 31a-32a).

Judge Rives dissented on all points. In his view the respondent was a public official and the publication related to his official conduct, within the principle of *New York Times* (Appendix B, pp. 36a-46a); the trial court's instruction did not comply with the *New York Times* standard since it permitted "recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood" (Appendix B, pp. 41a-42a); it was the duty of the District Court to give effect to the supervening decision of this Court by granting the motion for new trial (Appendix B, p. 46a) and the defendant may not be "said to have waived by 'silence' a constitutional right not enunciated at the time" (Appendix B, p. 42a).

Apart from the constitutional deficiency of the criterion of malice embodied in the District Court's instruction to the jury, Judge Rives also concluded that the $400,000 punitive award was a deprivation of property without due process and a prior restraint forbidden by the First Amendment; and that the jury verdict of $3,000,000 so reflected passion and prejudice that it could not be cured by the remittitur consistently with the Seventh Amendment. These grounds Judge Rives thought, were all properly presented in petitioner's attack upon the verdict and upon the District Court's denial of the motions for new trial.

A petition for rehearing before the Court of Appeals *en banc*, filed under Fifth Circuit Rule 25(a), was denied by the same panel of the Court by the same divided vote, the majority and the minority reiterating their positions in further opinions (Appendix B, pp. 62a-75a).

REASONS FOR GRANTING THE WRIT.

I.

In holding that the constitutional limitations on the standard of liability in libel actions, enunciated by the decision of this Court in *New York Times Co. v. Sullivan*, may be disregarded in reviewing a verdict and judgment rendered prior to the *Times* decision on the ground that the question was not raised by the defendant at the antecedent trial, the Court of Appeals has decided an important federal question in a way that conflicts with applicable decisions of this Court and of the courts of other Circuits.

Ever since the early days of the Republic this Court has affirmed the duty of the courts of the United States to decide cases in accordance with the law prevailing at the time when they are called upon to render judgment, including, in the case of an appellate court, the time of the appellate judgment. *United States v. The Schooner Peggy*, 1 Cranch 103 (1801). The doctrine applies to "*nisi prius* and appellate tribunals alike" (*Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543 [1941]) and has been reaffirmed repeatedly upon a supervening change in the law governing the cause, whether the change was worked by treaty as in *The Schooner Peggy*, by constitutional amendment as in *United States v. Chambers*, 291 U. S. 217 (1934); *Massey v. United States*, 291 U. S. 608 (1934), by the repeal or the enactment of a statute, as in *United States v. Tynen*, 11 Wall. 88 (1870); *United States v. Alabama*, 362 U. S. 602 (1960); *Hamm v. Rock Hill*, 379 U. S. 306 (1964), by a novel interpretation of a statute as in *Hormel v. Helvering*, 312 U. S. 552 (1941); *Helvering v. Richter*, 312 U. S. 561 (1941); *Uebersee Finanz-Korp. v. McGrath*, 343 U. S. 205, 212-213 (1952) or by a judicial alteration of a rule of common law (*Vandenbark v. Owens-Illinois Glass Co., supra*).

That the rule governs when the change in law derives from a revised interpretation of the Constitution by this Court assuredly is not an open question. See *Linkletter v. Walker,* 381 U. S. 618, 622-629 (1965); *Griffin v. California,* 380 U. S. 609 (1965); *White v. Maryland,* 373 U. S. 59 (1963). Whether or not the change will be accorded retrospective operation in collateral attack upon a final judgment, it will, as this Court said in *Linkletter* "be given effect while a case is on direct review" (381 U. S. at 627).

The judicial duty thus defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefit at stages of the litigation prior to the time when it occurred. Such a condition would be patently unthinkable in cases where the change is wrought by legislative action, since no ruling could be premised upon unenacted legislation. *Cf. 149 Madison Avenue Corp. v. Asselta,* 331 U. S. 795 (1947), *modifying* 331 U. S. 199 (1947); *Alaska Juneau Gold Mining Co. v. Robertson,* 331 U. S. 793 (1947); *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446, 477 (1948). The situation is no different when the change is brought about by a decision modifying the prevailing norm. Here, too, a lower court must make its rulings prior to the change under the law that is established at that time. A litigant wishing himself to challenge the prevailing rule may, to be sure, be asked to lay the groundwork of that challenge in the lower court, futile though his effort there may be. *Cf. Yakus v. United States,* 321 U. S. 414, 444-445 (1944). The higher court will thus obtain the benefit of ventilation of the issue in the court below before it must confront the novel question raised.[3] But neither this nor

3. Petitioner's motion for new trial, filed under Rule 60(b) promptly following the *New York Times* decision and before this judgment became final (*cf. Polites v. United States,* 364 U. S. 426, 433 [1960]), afforded the District Court an opportunity to rule on the effect of that decision prior to the Court of Appeals' review.

any other purpose of the legal system is subserved by insisting that a litigant anticipate a change he does not seek to bring about, under penalty of forfeiting its benefit if it should subsequently be ordained, while his case is still pending in the courts. Even a state rule of procedure must be shown to serve a valid interest of the state judicial system if it is relied on to foreclose consideration of a federal contention. *Henry v. Mississippi,* 379 U. S. 443 (1965). A federal court can surely have no greater freedom to decree a forfeiture of constitutional protection on a ground that serves no useful purpose in administration of the law.[4]

That there was no anticipatory objection in *Griffin, White, Helvering* or *Uebersee* (*supra* pp. 10-11) is, we submit, decisive of the proposition that it may not be required as a pre-condition of invoking supervening judgments of this Court. This is the view of the three Circuit Courts which, anticipating or following this Court's decision in *Linkletter* held nonetheless that *Mapp v. Ohio,* 367 U. S. 643 (1961), governed in cases pending on direct review at the time of the *Mapp* decision, despite the absence of objection to the evidence when it was offered at the antecedent trial. *United States ex rel. Carafas v. LaVallee,* 334 F. 2d 331 (2d Cir. 1964), *cert. denied,* 381 U. S. 951 (1965); *United States ex rel. West v. LaVallee,* 335 F. 2d 230 (2d Cir. 1964); *Dillon v. Peters,* 341 F. 2d 337 (10th Cir. 1965); *United States ex rel. Dalton v. Myers,* 342 F. 2d 202 (3d Cir. 1965). State courts, facing the question on appeal, have reached the same decision on the issue. *People v. Loria,* 10 N. Y. 2d 368 (1961); *State v. Smith,* 37 N. J. 481 (1962); *Commonwealth ex rel. Ensor v. Cummings,* 416 Pa. 510 (1965);

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4. Since the District Court, ruling on petitioner's motion for new trial under Rule 60(b), held the *New York Times* decision inapplicable to this cause, it is entirely clear that the anticipation of that issue at the trial by an objection to the charge could not in fact have altered the result.

cf. Commonwealth v. Jacobs, 346 Mass. 300 (1963); *People v. Kitchens,* 46 Cal. 2d 260, 262-263 (1956). The result has been the same in pending cases calling for the application of *Malloy v. Hogan,* 378 U. S. 1 (1964), and *Griffin v. California;* 380 U. S. 609 (1965). See *People v. Roberts,* — Cal. 2d —, 45 Cal. Rptr. 155 (1965); *State v. Lanzo,* 44 N. J. 560 (1965); *People v. McLucas,* 15 N. Y. 2d 167 (1965); *cf. Tehan v. United States ex rel. Shott,* 381 U. S. 923 (1965). So too under *Escobedo v. Illinois,* 378 U. S. 478 (1964). See *People v. Hillery,* 62 Cal. 2d 692 (1965); *King v. State,* — Del. —, 212 A. 2d 722 (1965); *State v. Clifton,* — Ore. —, 401 P. 2d 697 (1965). For other Court of Appeals decisions giving effect to later rulings not anticipated by an earlier submission, see, *e.g., Sulzbacher v. Continental Casualty Co.,* 88 F. 2d 122 (8th Cir. 1937); *Ruppert v. Ruppert,* 134 F. 2d 497 (D. C. Cir. 1942); *United States v. O'Connor,* 237 F. 2d 466, 471 (2d Cir. 1956).

The decision of the court below cannot be reconciled with this impressive body of authority and, dealing as it does with the respect to be accorded to decisions of this Court, it urgently demands review. The decision, to be sure, was cast in terms of finding "waiver" by petitioner. But the sole ground of "waiver" was the failure to advance in the trial court *before* this Court's decision in *New York Times Co. v. Sullivan* "the constitutional grounds asserted in Times" to the knowledge of one of petitioner's co-counsel (Appendix B, pp. 13a-18a, 21a). If, as we submit, there was no duty to anticipate the ruling of this Court in *New York Times,* there was no basis for the finding made. See, *e.g., United States ex rel. Angelet v. Fay,* 333 F. 2d 12, 16 (2d Cir. 1964), *aff'd,* 381 U. S. 654 (1965). *United States ex rel. Durocher v. LaVallee,* 330 F. 2d 303, 309-310 (2d Cir. 1964). *Cf. England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411, 422 (1964); *Aetna Insur-*

ance Co. v. Kennedy, 301 U. S. 389, 393 (1937). The reference to a "known right or privilege" in *Johnson v. Zerbst,* 304 U. S. 458, 464 (1937) and *Fay v. Noia,* 372 U. S. 391, 439 (1963) envisages, of course, a right known to exist, not one merely asserted in another litigation. Indeed, the Circuit Court's concern with "waiver" added to the forfeiture that it decreed the spectacle of an inquiry into the extent to which the various attorneys for petitioner were aware of the issues tendered in *New York Times.* Far from supporting the determination of the Court, that "unseemly trial of Curtis' lawyers" (Rives, J., dissenting, Appendix B, p. 74a) adds further reason for review.

That the *New York Times* decision broke new ground in holding that the First and Fourteenth Amendments impose limits on state libel law, as well as in its formulation of the nature of the limits they impose, is not a point we feel obliged to labor here. See *New York Times Co. v. Sullivan,* 376 U. S. 254, 268, 279, 283, 297, 299 (1964); *cf. Abernathy v. Patterson,* 295 F. 2d 452, 456 (5th Cir. 1961).

We submit, therefore, that the Court of Appeals was legally obliged to test this judgment in the light of this Court's ruling in the *New York Times* decision. But even if the absence of an anticipatory objection at the trial engendered a discretion to apply or disregard the supervening judgment of this Court "as may be just under the circumstances" (28 U. S. C. § 2106; see *Hormel v. Helvering,* 312 U. S. 552, 556-557 [1941]), we think it clear that such discretion was abused by the decision to decline review. For here the issue was presented to the District Court at the first reasonable opportunity following this Court's decision (*cf. Herndon v. Georgia,* 295 U. S. 441, 444 [1935]; *Polites v. United States,* 364 U. S. 426 [1960]); the District Court decided it upon the merits, its ruling making clear that any earlier submission would have had no influence on the

result;[5] and only the unfounded ground of waiver was adduced to justify denial of review. Even after a plea of *nolo contendere,* this Court has been astute to grant an opportunity to a defendant to present a possible defense established by a subsequent decision. *United Brotherhood of Carpenters v. United States,* 330 U. S. 395, 411-412 (1947). *Cf. United States v. Ohio Power Co.,* 353 U. S. 98 (1957); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964). No less solicitude is due to a defendant who has not confessed to judgment when enormous punishment has been imposed and the supervening ruling goes to First Amendment rights.

II.

The District Court in ruling on the motion for new trial under Rule 60(b) held that the publication here in suit was not protected by the ruling of this Court in *New York Times Co. v. Sullivan* and subsequent decisions because the respondent was not a "public official" within the meaning of the rule this Court laid down. The only other Judge who passed upon the issue, Judge Rives dissenting

5. The Court of Appeals in denying the petition for rehearing, regarded as "persuasive" the respondent's suggestion that petitioner pleaded truth as a defense rather than raising constitutional defenses "in order to get the right to open and close the arguments" (Appendix B, pp. 67a-68a). The right to open and close was, however, a concomitant of the burden of proof which the Georgia law placed on defendant if the plea of truth was made (R. 44; *Ga. Code Ann.* § 105-1801). If a constitutional defense had been coupled with that plea, there is no support whatever for the view that the burden would have shifted to the plaintiff. In fact, the defense presumably would have been stricken upon motion. Moreover, if that defense could not have been coupled with the plea and the defendant had to choose between a plea that it thought valid and an as yet unestablished defense, as the Court appears to intimate below, it is unthinkable to find a waiver of federal right in the choice to rely upon the plea. *Cf. Fay v. Noia,* 372 U. S. 391, 439 (1963); *Green v. United States,* 355 U. S. 184, 192-194 (1957); *England v. Louisiana State Board of Medical Examiners,* 375 U. S. 411, 422 (1964); *Whitus v. Balkcom,* 333 F. 2d 496 (5th Cir. 1964).

in the court below, squarely rejected this conclusion. The issue thus presented plainly is a question calling for this Court's review.

The question is, indeed, akin to that *sub judice* in *Rosenblatt v. Baer,* No. 38, this Term, argued here on October 20, 1965. Here, as in *Rosenblatt,* the trial court's charge did not conform to the requirements of *New York Times; Garrison v. Louisiana,* 379 U. S. 64 (1964); *Moity v. Louisiana,* 379 U. S. 201 (1964); *Henry v. Pearson* and *Henry v. Collins,* 380 U. S. 356 (1965), if the respondent's official position brought the publication within the constitutional privilege that those decisions have established. In *Rosenblatt* the plaintiff was employed by County Commissioners to operate a public recreation area and the publication impugned his honesty in the discharge of those official duties. Here the respondent was employed as the Athletic Director of a State University by an Athletic Association functioning as agent of the Board of Regents and the publication impugned his fidelity in the discharge of the public trust that he assumed. The considerations deemed to warrant this Court's review in *Rosenblatt* accordingly are applicable here.

If, as we submit, the rule of *New York Times* applies to any publication critical of the conduct of public employees in the discharge of their duties of employment, since there is a public interest in the way that they discharge their duties, it is clear that a reversal is demanded here. The man who wished his tombstone to record that he was "father of the University of Virginia" (Randall, *The Life of Thomas Jefferson,* vol. iii, pp. 563-564 [1858]) would surely be amazed by the conclusion of the District Court that the Director of Athletics of a State University was not a "public official," within the meaning of a constitutional principle designed to preserve free discussion of the way in which all public trusts may be discharged.

It is, of course, irrelevant that the District Court considered that "there was ample evidence from which a jury could have concluded that there was a reckless disregard of whether the article was false or not" (242 F. Supp. at 395; Appendix B, p. 96a). The Court did not submit that question to the jury and its verdict made no finding on the issue. The ruling that there was a jury question on defendant's plea of truth, despite the burden of persuasion placed on the defendant, applies *a fortiori* on this record if the plaintiff must establish reckless disregard.

III.

Whether or not the rule of liability applied in the District Court satisfied the constitutional requirements defined by the *New York Times* and subsequent decisions, the verdict and the judgment in this cause present substantial questions of profound importance to the freedom of the press.

First: The jury verdict of $3,000,000 punitive damages for a publication causing injury assessed at $60,000 was not only "grossly excessive", as the District Court has found; it contravened the First Amendment and entailed a deprivation of due process. These points were made against the verdict by the motion for new trial (R. 46-48) and were, therefore, plainly open in the Court of Appeals on appeal from the judgment.

Conceding, *arguendo,* that a punitive award in libel cases, imposed as a deterrent to the defendant and to others and "to protect the community" (R. 1356), is not *per se* an unconstitutional method of regulating publication (*cf. Day v. Woodworth,* 13 How. 362, 370-371 [1851]), it is clear that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedoms." *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940). For that reason, even though a measure bur-

dening the freedom of expression serves a valid end, it must be tested by "close analysis and critical judgment" (*Speiser v. Randall*, 357 U. S. 513, 520 [1958]) and "viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U. S. 479, 488 (1960). See also, *e.g.*, *Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *N. A. A. C. P. v. Alabama*, 357 U. S. 449 (1958); *Smith v. California*, 361 U. S. 147, 150-151 (1959); *Bates v. Little Rock*, 361 U. S. 516 (1960); *Freedman v. Maryland*, 380 U. S. 51 (1965). As Mr. Justice Brandeis said long ago "a police measure may be unconstitutional merely because the remedy, although effective as a means of protection, is unduly harsh or oppressive." *Whitney v. California*, 274 U. S. 357, 377 (1927) (concurring opinion). Indeed, quite apart from the protection of the First Amendment, this Court has held that a penalty or money judgment deprives of property without due process if it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression". *Life & Casualty Co. v. McCray*, 291 U. S. 566, 571 (1934).

Since the First and the Fourteenth Amendments apply to all the agencies of government (*N. A. A. C. P. v. Alabama*, 357 U. S. 449, 463 [1958]; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 68 [1963]), a jury verdict must be tested by these standards, no less than a judicial or administrative action or an act of legislation.

So tested, we believe it clear that the $3,000,000 verdict, representing 65% of the defendant's retained earnings (R. 1389), was in violation of the Constitution. The verdict plainly was designed to put defendant out of business and was thus, as Judge Rives said below (Appendix B, pp. 51a-52a), equivalent to a prior restraint. Prior restraint or not, it takes no argument to show that such a penalty, imposed in addition to full compensation for all injury believed to be inflicted on the plaintiff and the mitigation of such

injury involved in the mere fact of verdict, "unduly" infringed the "protected freedom" and inflicted "sheer oppression". Nothing could be better calculated than a verdict of this kind to impose "the pall of fear and timidity" upon the press and thus create "an atmosphere in which the First Amendment freedoms cannot survive". *New York Times Co. v. Sullivan*, 376 U. S. at 278. The maximum penalty against a corporation for criminal libel is fixed by Georgia law at a fine of $1,000. *Ga. Code Ann.* §§ 26-2101; 27-2506. That legislative judgment as to what is necessary to protect the community provides, in our submission, the perspective for appraising the constitutional validity of this award.

This jury verdict, therefore, even more than that in *New York Times* supplies what Mr. Justice Black, concurring in that judgment, called "dramatic proof . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials" (376 U. S. at 294). The only way that threat can be removed, short of according the absolute privilege this Court declined in *Times* to find embodied in the First Amendment, is to hold that a jury's compensatory verdict must bear reasonable relationship to the amount of damage shown and that a punitive additional award must be proportionate to the offense committed, as that offense is measured by the damages incurred. The punitive verdict here did not comport with these requirements and thus was tainted by a violation of the Constitution.

Second: If the verdict was, as we submit, unconstitutional, it was not saved by the remittitur required by the District Court. For even though the use of a remittitur may be too well established to be "reconsidered or disturbed at this late day," as this Court reluctantly declared

in *Dimick v. Schiedt*, 293 U. S. 474, 485 (1935), it is no less established that a verdict based upon a jury's prejudice cannot be cured. *Minneapolis, St. P. & S. S. M. Ry. v. Moquin*, 283 U. S. 520, 521 (1931); *National Surety Co. v. Jean*, 61 F. 2d 197, 198 (6th Cir. 1932); *Brabham v. Mississippi*, 96 F. 2d 210 (5th Cir. 1938); *Ford Motor Co. v. Mahone*, 205 F. 2d 267 (4th Cir. 1953). A verdict violative of the Constitution surely is no less incurably defective, if, indeed, the jury's prejudice is not in such a case to be presumed.

The vice of such a verdict is shown plainly in this case. For when the trial court found the jury's verdict to be "grossly excessive", it did not ask itself what size of verdict might comport with constitutional requirements and show a due regard for the importance of preserving freedom of the press. It asked, instead, what was the largest verdict "ever sustained for punitive damages by the Appellate Courts" and, finding that figure to be $175,000 (of which $100,000 was the largest sum awarded against any one defendant) in *Reynolds v. Pegler*, 223 F. 2d 429 (2d Cir. 1955), it expressed its "considered opinion that the maximum sum" that "should have been awarded . . . should be $400,000" (225 F. Supp. at 919-920; Appendix B, pp. 81a-83a). That the magnitude of the invalid jury verdict exerted a substantial influence upon the Court's determination is, therefore, undeniable. The Court's award was inescapably a "fruit" of the illegal action of the jury. *Cf., e.g., Wong Sun v. United States*, 371 U. S. 471, 484 (1963).

Third: Even if the judgment must be tested by the District Court's award, without regard to the invalid verdict of the jury, we contend that the punishment imposed is repugnant to the Constitution.

In assessing the sum of $400,000 as "the maximum" that "should have been awarded", the Court, as we have

said, employed no standard other than its search for the highest punitive award that an appellate court had thus far sustained and, finding that statistic, more than doubled the top figure that it found. Such a determination, taking no account of the effect of such a punishment upon defendant or of the threat of like awards on other publications revealed no solicitude at all for First Amendment guarantees. The size of the award, no less than its unprincipled assessment, thus impinges far too heavily and arbitrarily upon the freedom of the press to preserve the "breathing space" required by that First Amendment freedom "to survive". *N. A. A. C. P. v. Button,* 371 U. S. 415, 433 (1963).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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